NO. 259196

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

GLEN ARTHUR SCHALER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR OKANOGAN COUNTY
The Honorable John Bridges

APPELLANT'S OPENING BRIEF

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State to prove every element of the charged crime beyond a reasonable doubt. To obtain a conviction under RCW[2] 9A.46.020, the State had to satisfy both the statutory elements of the crime and First Amendment demands.

Here, evidence presented did not prove beyond a reasonable doubt a nightmare constituted a true threat. Given that, did the trial court err when it denied the defendant's motion to dismiss based on the State's failure to prove the elements of the crime charged?

2. Findings made by a trial court must be supported by substantial evidence in the record. Only findings of fact supported by substantial evidence will be upheld on appeal.

Here, Finding of Fact and Conclusion of Law No. 6 was not supported by the record. Did the trial court err when it entered the unsupported finding?

[1] CP stands for Clerk's Papers.
[2] RCW refers to Revised Code of Washington.

3. Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. Instructions must also properly inform the jury of the applicable law, not mislead the jury, and permit each party to argue its theory of the case.

Here, a jury instruction misapplied the law and ultimately relieved the State of its burden to prove each element of the crime charged. The erroneous instruction presumably misled the jury and tainted its verdict. Given that, did the trial court err when it presented the erroneous jury instruction?

C. STATEMENT OF THE CASE

a. Substantive History

Glen Arthur Schaler awoke from a nightmare. Terrified and confused, he telephoned a crisis intervention hotline for help. "I wasn't in control. I was hallucinating, hearing voices, believing things were going that weren't happening." 2/21/07 RP at 26.

According to the crisis counselor, "[Mr. Schaler] was crying.

> He was you know pretty hysterical, saying that he thought he had killed his neighbor. He said that he'd been having dreams that he had killed his neighbor and he thought that it's been occupying a lot of his daytime too, his thoughts. And that he had a dream that he went into and I think he told me the neighbor's name. I didn't get that at the time, and he slit her throat. He said that he woke up and he was covered with blood and he was very, very scared."

2/6/07 RP at 241-242. "He was tearful. He was very sad when he called. Very hysterical." 2/6/07 RP at 269.

Within minutes, the counselor notified police. "It caused quite a ruckus in the front desk, and so, there were a few people in, in the office with me, and I had asked Jordan to dispatch police, because it seemed like a pretty legitimate call at the time." 2/06/07 RP at 243. "I think I told [Mr. Schaler] that we were sending somebody out there." 2/06/07 RP at 243.

"I can't remember if he called me, or I called him back, but at that time, I called him back, and I said, "They're there to check on your neighbor." 2/06/07 RP at 244. "And I think at that point, he made the threat that he was going to kill himself." 2/06/07 RP at 244.

The counselor asked Mr. Schaler to come in for further evaluation. "I just needed to see him face to face to see what was really going on." 2/06/07 RP at 246. "He presented on the phone maybe a little bit paranoid, a little bit, not thinking clearly, and my goal was to get him in to an evaluation setting and see if I could make sense out of what was going on in his life." 2/06/07 RP at 254-55.

Mr. Schaler seemed reluctant to go in for an evaluation. "I asked him several times, and he said he couldn't." 2/06/07 RP at 244. Concerned, the counselor faxed a pick up order to police.[3] She informed the officer Mr. Schaler thought "he was covered in blood and believed he had killed his neighbor." 2/06/07 RP at 207.

When the officer reached his residence, she encountered Mr. Schaler, still quite terrified and confused. "When I got into the house, Mr. Schaler was

[3] "A pick up order is for us to go to a location or locate an individual who's named on the order and bring them either to the hospital or to Mid Valley for an evaluation." 2/06/07 RP at 226.

wearing a brown short-sleeved pocket tee-shirt and a pair of jeans. He was sweaty and panting. He appeared like he was having difficulty getting a complete breath." 2/06/07 RP at 212. "I'd ask him if he believed that he'd killed his neighbors. His response was I dreamed I slit her throat." 2/06/07 RP at 207. "I couldn't see any blood on him." 2/06/07 RP at 208. "The shirt was soiled but there were no signs of blood." 2/06/07 RP at 214. "He told me he felt funny. He said he couldn't feel his hands or feet." 2/06/07 RP at 212. He indicated that he had not taken his medication that morning." 2/06/07 RP at 212.

The officer testified that she "was able to get Mr. Schaler to take his medication. I waited till I had clearance to give him his medication." 2/06/07 RP at 212. After he had taken the medication, Mr. Schaler seemed more calm and compliant. 2/06/07 RP at 215.

The officer then left the house to assess the area. "I still hadn't negated that we had a criminal investigation or that there hadn't been someone who was seriously injured, so I went as quickly as I could to the Busbin residence." 2/06/07 RP at 208-09. "I went to the front door, it was locked. I peered in through the screens. I couldn't see any signs of violence." 2/06/07 RP at 209. Assisting officers "canvassed the area more thoroughly and were able to determine that Mr. Busbin was out of town on a jobsite and that Ms. Busbin had been seen leaving earlier in the morning to go to work." 2/06/07 RP at 215.

The officer returned to Mr. Schaler's house and transported him to the hospital for evaluation. 2/06/07 RP at 229-30. During the evaluation, Mr. Schaler tearfully and desperately recounted the nightmare to the crisis counselor. 2/06/07 RP at 266. At some point, the officer was summonsed back to the hospital. Mr. Schaler's commitment had changed. "It had gone from a voluntary commitment status to an involuntary commitment status." 2/06/07 RP at 220. Mr. Schaler was experiencing a mental breakdown. 2/06/07 RP at 261. So, "I determined to detain him under the ITA law for danger to self and danger to others." 2/06/07 RP at 255.

In the petition for involuntary commitment, the counselor quoted Mr. Schaler as having said, "I think I killed my neighbor. I had a dream I went to her house and slit her throat. I had blood all over the house and on my hands. I hope I didn't really kill her. I want to kill her with my bare hands. I dream about it. But in the dream she hits me and scratches my face." 2/06/07 RP at 267-68.

The counselor contacted the neighbors. She told them Mr. Schaler had threatened to kill them. "I think that I contacted them, I think it's a duty to protect, and I have to contact anybody that's made threats, viable threats immediately." 2/06/07 RP at 251. Some time later, a prosecuting attorney asked the officer to contact the neighbors and obtain statements. 2/06/07 RP at 233-34.

b. Procedural History

The State ultimately charged Mr. Schaler with two counts Harassment under RCW 9A.46.020 (1) (a) (i). CP at 224-25; 115-16; and 47-48. During pre-trial deliberations, Mr. Schaler moved the court to suppress evidence which was obtained in violation of the law and dismiss the action. CP at 200-203. Specifically, Mr. Schaler argued communication between the counselor and he was privileged. The court denied Mr. Schaler's motion. It found the counselor was proper in disclosing statements to the neighbors. It further found Mr. Schaler threatened to slit the throats of both Ms. Busbin and Ms. Nockels. CP at 110-114. Mr. Schaler moved the court to reconsider its ruling, but the court denied the motion for reconsideration. CP at 99-109.

A jury trial commenced. At the end of the State's case, Mr. Schaler moved the court to dismiss the action because the State failed to prove the elements of the crime charged. 2/07/07 RP at 48. The trial court denied the motion and the jury found Mr. Schaler guilty of both counts. 2/07/07 RP at 61; CP at 24 and 25. This appeal followed. CP at 07.

D. ARGUMENT

I. EVIDENCE PRESENTED DID NOT PROVE BEYOND A REASONABLE DOUBT A NIGHTMARE CONSTITUTED A TRUE THREAT TO KILL.

A. Due process requires the State to prove each element of a crime beyond a reasonable doubt. In a criminal prosecution, due process requires the State to prove every element of the charged crime beyond a reasonable doubt. *State v. Teal*, 152 Wn.2d 337, 96 P.3d 974 (2004); *In re Winship*, 397

U.S. 361-64, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 209, 829 P.2d 1068 (1992).

Here, Mr. Schaler was charged with two counts Harassment pursuant RCW 9A.46.020 (1) (a) (i) and (2) (b). CP at 47-48; CP at 115-116; and CP at 224-225. The statute provides, in pertinent part, "a person is guilty of harassment if without lawful authority, the person knowingly threatens to cause bodily injury immediately or in the future to the person threatened or to any other person." RCW 9A.46.020.

Because RCW 9A.46.020 criminalizes speech, it follows that the statute must be interpreted to be consistent with the First Amendment. *State v. Kilburn*, 151 Wn.2d 41, 84 P.3d 1215 (2004). Therefore, to obtain a conviction, the State had to satisfy both the statutory elements of the crime and First Amendment demands. *State v. Kilburn*, 151 Wn.2d at 54.

B. The State did not satisfy First Amendment demands. "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty--and thus a good unto itself--but also is essential to the common quest for the truth and the vitality of society as a whole." *Id.* at 42 (citing, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)).

While laws may proscribe "all sorts of conduct" the same is not true of speech; the law "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 579, 115 S. Ct. 2388, 132 L. Ed. 2d 487 (1995).

In order to preserve the vital right to free speech, it is imperative that a court carefully assess statements at issue to determine whether they fall within or without the protection of the First Amendment. *State v. Kilburn*, 151 Wn.2d at 42. An appellate court must be exceedingly cautious when assessing whether a statement falls within the ambit of a true threat in order to avoid infringement on the precious right to free speech. It is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court's findings. The First Amendment demands more. *State v. Kilburn*, 151 Wn.2d at 49.

Whether language constitutes a true threat is an issue of fact for the trier of fact in the first instance. *United States v. Fulmer*, 108 F.3d 1492 (1st Cir. 1997); *Melugin v. Hames*, 38 F.3d 1485 (9th Cir. 1994). However, a rule of independent appellate review applies in First Amendment speech cases. An appellate court "'must make an independent examination of the whole record, . . . so as to assure [itself] that the judgment does not constitute a forbidden intrusion on the field of free expression." *Kilburn*, 151 Wn.2d at 50 (quoting *Bose*, 466 U.S. at 508)(internal quotation marks omitted). The rule of

independent appellate review does not extend to factual determinations such as findings on credibility, however. *Id.*; *see* *United States v. Hanna*, 293 F.3d 1088 (9th Cir. 2002). So, to avoid unconstitutional infringement of protected speech, RCW 9A.46.020 (1) (a) (i) must be read as clearly prohibiting only true threats. *State v. Williams*, 144 Wn.2d 208, 26 P.3d 890 (2000); State v. *J.M.*, 144 Wn.2d 478, 28 P.3d 720 (2001).

C. A nightmare does not constitute a true threat. "A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." *Williams*, 144 Wn.2d at 208-09 (quoting *State v. Knowles*, 91 Wn. App. 373, 957 P.2d 797 (1998) (quoting *United States v. Khorrami*, 895 F.2d 1192 (7th Cir. 1990)); accord *J.M.*, 144 Wn.2d at 477-78. A true threat is a serious threat, not one said in jest, idle talk, or political argument. *United States v. Howell*, 719 F.2d 1260 (5th Cir. 1984); *J.M.*, 144 Wn.2d at 478; *State v. Hansen*, 122 Wn.2d 717 n.2, 862 P.2d 117 (1993). The true threat test is determined under an objective standard that focuses on the speaker. *State v. Kilburn*, 151 Wn.2d at 44.

Recently, the Ninth Circuit applied the true threat test in *Bauer v. Simpson*, 261 F.3d 775 (9th Circuit 2001). In that case, a college disciplined a professor who had published the following arguably threatening writings in a campus newspaper: a fantasy description of a funeral for a college trustee and the asphyxiation of the college president; illustrations showing the president

beheading his enemies; an illustration of a two-ton granite 'shit list' dropping on the president's head. Shannon McMinimee, *Lavine v. Blaine School District: Fear Silences Student Speech in Ninth Circuit*, 77 Wash. L. Rev. 545 (2002).

The college argued that these writings constituted true threats. *Bauer v. Simpson* at 782-783. In addition, the college asked the court to consider other related events involving the professor. *Id.* at 784 (noting that no allegation had been made that the professor had ever been physically abusive or violent, on or off campus).[4] For example, the college claimed the professor had experienced verbal run-ins with other employees, told his supervisor that he and the president were 'going down', told a co-worker 'your day has come' after the co-worker mocked a friend, and referred to minority co-workers as 'the dark side.' See *id.* The college also submitted a report from a psychiatrist who believed the professor was sufficiently disturbed to require counseling and was an increasingly ominous risk because of his unambiguously stated fantasies of revenge and destruction.[5] See *id.* at 788.

The Court held despite a turbulent campus community and other related events involving the professor, there was simply no way a reasonable reader would have construed the writings and illustrations to be true threats.

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[4] This paragraph was taken from Shannon M. McMinimee, Lavine v. Blaine School District: Fear Silences Student Speech in Ninth Circuit, 77 Wash. L. Rev. 548 (2002).

[5] This paragraph was taken from Shannon M. McMinimee, Lavine v. Blaine School District: Fear Silences Student Speech in Ninth Circuit, 77 Wash. L. Rev. 549 (2002).

Consequently, mere illustrations and fantasies are not direct and unambiguous enough to amount to true threats. *Id.* at 775.[6]

The facts here are somewhat analogous to those in *Bauer v. Simpson*. Like the professor's relationship with his colleagues, Mr. Schaler's relationship with his neighbors was quite turbulent. They often engaged in acrimonious discussions about property lines and fruit trees. "There was a problem with the Busbins long before these other folks moved in with them building the fence across the alley, telling me I can't use it." 2/21/07 RP at 37. "They believed I had enough access to my property." 2/21/07 RP at 28.

The relationship became more strained when Mr. Schaler removed an obstructive fruit tree. "I have had permission for several years to cut the trees down, anything in the alleyway that would scratch my vehicle, or not allow me to go through the alley." 2/21/07 RP at 28. "I remember cutting down the apple tree, but I also remember spending a year in contact with the county and calling Schultz, the county commissioner." "Ms. Busbin says I cut her tree out of her yard. After they had been informed by the officer it was an open alley by the Planning Commission, they come up here and lie to get restraining orders." 2/21/07 RP at 31.

Unlike the professor, however, Mr. Schaler's nightmare neither stemmed from malice nor vengeance. "[ ] something was trying to force me to do something that was against my values... I got help. I can't help from hearing things; I can't help with the hallucinations. They asked me what I

[6] This paragraph was taken from Shannon M. McMinimee, Lavine v. Blaine School District: Fear Silences Student Speech in Ninth Circuit, 77 Wash. L. Rev. 549 (2002).

thought happened. I told them straight out, I've been under a lot of stress from my neighbors because they keep whining about me. I mean I have done nothing to them." 2/21/07 RP at 36. "I was having thoughts that were telling me to do things. Like I said, that were against my values and all I was trying to do was communicating those thoughts to the people that were trying to get me help." 2/21/07 RP at 37.

There was no way a reasonable person, in Mr. Schaler's condition, could have foreseen that a mental health professional would have interpreted a nightmare as a true threat to kill. It was a delusion or hallucination. Such experiences are too ambiguous to rise to the level of a true threat. The only appropriate remedy is to reverse Mr. Schaler's conviction.

II. THE TRIAL COURT ERRED WHEN IT ENTERED A FINDING OF FACT UNSUPPORTED BY THE EVIDENCE.

A. Mr. Schaler challenges the court's finding. When challenged, the findings made by a trial court must be supported by substantial evidence in the record. *State v. Macon*, 128 Wn.2d 799, 911 P.2d 1004 (1996); *Tacoma v. State*, 117 Wn.2d 361, 816 P.2d 7 (1991) (citing *Morgan v. Prudential Ins. Co. of Am.*, 86 Wn.2d 437, 545 P.2d 1193 (1976)). Substantial evidence is evidence sufficient in quantum to persuade a fair-minded person of the truth of the stated premise. *State v. Thetford*, 109 Wn.2d 406, 745 P.2d 496 (1987).

An appellate court reviewing findings based on conflicting evidence need not consider evidence contrary to the findings. The question is, "whether the evidence most favorable to the prevailing party supports challenged findings." *North Pac. Plywood, Inc. v. Access Road Builders, Inc.*, 29

Wn.App. 232, 628 P.2d 482 (1981). Only findings of fact supported by such substantial evidence will be upheld on appeal. *Thorndike v. Hesperian Orchard, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). Unchallenged findings are verities on appeal. *State v. Broadaway*, 133 Wn.2d 131, 942 P.2d 363 (1997).

B. Because the trial court's written finding does not accurately reflect the evidence presented, it cannot be upheld on appeal. Here, the trial court made a finding that was not supported by the evidence. The court found, in pertinent part, "Mr. Schaler threatened to slit the throats of both Ms. Busbin and Ms. Nockels." CP at 110-114.

Nothing, in the record, definitively proved Mr. Schaler threatened to slit his neighbors' throats. The counselor quoted Mr. Schaler's statements as basis for a petition for involuntary commitment. According to the counselor, Mr. Schaler said, "I think I killed my neighbor. I had a dream I went to her house and slit her throat. I had blood all over the house and on my hands. I hope I didn't really kill her. I want to kill her with my bare hands. I dream about it. But in the dream she hits me and scratches my face." 2/06/07 RP at 267-68.

The trial court's written finding erroneously characterized what was actually presented on the record and disregarded witness testimony. Given that, these findings cannot be upheld on appeal. After removing the unsupported finding from the record, there is no basis remaining to support Mr. Schaler's conviction. The only appropriate remedy is reversal and

remand for judgment of dismissal with prejudice. *State v. Rodgers*, 146 Wn.2d 60, 43 P.3d 1 (2002).

III. A JURY INSTRUCTION MAY HAVE TAINTED THE JURY AND RELIEVED THE STATE OF ITS BURDEN TO SATISFY FIRST AMENDMENT DEMANDS.

A. Jury Instruction No. 10 misled the jury. Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. *Victor v. Nebraska*, 511 U.S. 5-6, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). Although no specific wording is required, jury instructions must define reasonable doubt and clearly communicate that the State carries the burden of proof. *State v. Coe*, 101 Wn.2d 787-88, 684 P.2d 668 (1984). Instructions must also properly inform the jury of the applicable law, not mislead the jury, and permit each party to argue its theory of the case. *State v. LeFaber*, 128 Wn.2d 903, 913 P.2d 369 (1996).

This Court must "review jury instructions to determine whether they correctly state the law." *Griffin v. West RS, Inc.*, 143 Wn.2d 87, 18 P.3d 558 (2001). "Questions of law are reviewed de novo." *Hertog v. City of Seattle*, 138 Wn.2d 275, 979 P.2d 400 (1999). Challenged instructions are also reviewed to determine "whether they permit the parties to argue their theories of the case, whether they are misleading, and whether when read as a whole they accurately inform the jury of the applicable law." *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 36, 864 P.2d 921 (1993).

Here, Instruction No. 10 did not accurately inform the jury of applicable law. It read, a "threat means to communicate, directly or indirectly, the intent to cause bodily injury immediately or in the future to the person threatened or to any other person." CP at 26-45. Because RCW 9A.46.020 prohibits only true threats, the jury should have been instructed on what constituted a true threat rather than just a threat.

Mr. Schaler did not object to Instruction No. 10 at trial. However, given the constitutional implications of an erroneous instruction, he raises the issue for the first time on appeal.

B. An erroneous jury instruction is an issue of constitutional magnitude which can be raised for the first time on appeal. The appellate court may refuse to review any claim of error, which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. RAP 2.5 (a) (3); *State v. Scott*, 110 Wn.2d 688, 757 P.2d 492 (1988); *State v. Contreras*, 92 Wn.App. 311, 966 P.2d 915 (1998).

The proper approach in analyzing alleged constitutional error raised for the first time on appeal involves four steps. *State v. Kirkman*, 126 Wn.App. 97, 107 P.3d 137 (2005). First, the Court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the Court must determine whether the alleged error is

manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the Court finds the alleged error to be manifest, then the Court must address the merits of the constitutional issue. Finally, if the Court determines that an error of constitutional import was committed, then, the court undertakes a harmless error analysis. *State v. Lynn*, 67 Wn.App. 345, 835 P.2d 251 (1992); *see also State v. Heatley*, 70 Wn.App. 585, 854 P.2d 658 (1993).

1. An instruction that presumably misleads the jury presents a constitutional issue. "Where an instructional error may be construed as relieving the State of the burden of proving an element of its case, the error is manifest and of constitutional magnitude and may therefore be raised for the first time on appeal." *State v. Stovall*, 115 Wn.App. 650, 63 P.3d 196 n.7 (2003) (citing *State v. Stein*, 144 Wn.2d 241, 27 P.3d 184 (2001)).

Here, Instruction No. 10 misapplied the law, presumably misled the jury and relieved the State from proving whether a nightmare was in fact a true threat.

2. The error is manifest. To demonstrate that an error is manifest, an appellant must show the alleged error "actually affected his or her rights." *State v. McNeal*, 145 Wn.2d 357, 37 P.3d 280 (2002). "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *State v. McFarland*, 127 Wn.2d 333, 899 P.2d 1251 (1995).

Some reasonable showing of a likelihood of actual prejudice is what makes a "manifest error affecting a constitutional right." State v. Lynn, 67 Wn.App. 346, 835 P.2d 251 (1992). *Manifest*, in this instance, means unmistakable, evident, or indisputable, as distinct from obscure, hidden, or concealed; essentially, the error must have practical and identifiable consequences in the trial of the case. Id. *Affecting* means having an impact or impinging on, or in short, to make a difference. A purely formalistic error is insufficient. *See* State v. Taylor, 83 Wn.2d 596, 521 P.2d 699 (1974).

A jury is presumed to follow the instruction of the court. State v. Grisby, 97 Wn.2d 499, 647 P.2d 6 (1982). "Absent any showing to the contrary, this Court must presume the jury followed the trial court's instruction." State v. Cerny, 78 Wn.2d 850, 480 P.2d 199 (1971), vacated, 408 U.S. 939 (1972).

Here, given the jury's verdict against the evidence, the likelihood of actual prejudice is great. The jury was only instructed to consider whether a threat had been made. The crime, under which Mr. Schaler was charged, however, requires the jury to consider whether a true threat had been made. The instruction failed to make that very significant distinction. Therefore, it is likely the jury followed the erroneous instruction and tainted its verdict.

3. The merits of the constitutional issue. As argued above, due process requires the State to prove not only statutory elements of the crime, but First Amendment demands. The court's instructions failed to

distinguish between threat and true threat. This ultimately relieved the State of its burden to satisfy First Amendment requirements.

4. The error was harmful. It is reversible error to instruct the jury in a manner relieving the State of its burden to prove every element of a crime beyond a reasonable doubt. *State v. Bennet* 161 Wn.2d 307, 165 P.3d 1241 (2007) (citing *Sullivan v. Louisiana*, 508 U.S. 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

Here, the jury was instructed in a manner that relieved the State of its burden to prove whether the nightmare was a true threat. The jury was only instructed to consider whether the nightmare constituted a threat. The instruction given failed to consider first amendment constitutional requirements.

This state's Supreme Court found if a jury instruction was insufficient to ensure a constitutional verdict it could not be deemed to be harmless beyond a reasonable doubt. *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006) (citing *United States v. Hanna*, 293 F.3d 1080, 1088 (9th Cir. 2002)). Reversal is the only appropriate remedy.

E. CONCLUSION

For the reasons set forth above, Mr. Schaler respectfully asks this Court to reverse his convictions.

Respectfully submitted this 22nd day of October, 2007.

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